IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR

J U D G M E N T

1. Vishnu Dutt Sharma Vs. State
(D.B. Criminal Appeal No.153/2002)

2. Vishnu Dutt Sharma Vs. State
{(D.B. Criminal Appeal No.54/2002 (Def.)}

D.B. Criminal Appeals Under Sections 374 of Cr.P.C. against the judgement dated 28.11.2001 in Criminal Case No.64/2001 passed by Shri Giriraj Prasad Gupta, RHJS, Additional District and Sessions Judge No. 1 (Fast Track), Jaipur City, Jaipur

Date of Judgement : : July 13th, 2006

Present

Hon'ble Mr. Justice Shiv Kumar Sharma
Hon'ble Mr. Justice Chatra Ram Jat

Mr.Rajesh Moondia) for the accused appellant
Mr.J.P. Goyal)

Mr. R.P. Kuldeep, PP for the State

BY THE COURT: (PER HON'BLE MR. JUSTICE CHATRA RAM JAT)

1. In the instant appeals challenge is made to the judgement dated November 28th, 2001 of Additional District and Sessions Judge No. 1 (Fast Track), Jaipur City, Jaipur, whereby the appellant has been convicted and sentenced as under:-

U/s. 302 IPC:

To undergo imprisonment for life and fine of Rs. 100/-, in default, to further undergo simple imprisonment for one year.

U/s. 201 IPC:

To undergo imprisonment for three years and fine of Rs. 100/-, in default, to further undergo simple imprisonment for three months.

2. It is the prosecution case that Radha Mohan Sharma (PW-2), father of the deceased Anuradha had lodged a report (Ex.4) in the Police Station Mansarovar, Jaipur on 12.11.1997 with the allegations that on the said day around 4.30 AM Darshan who happened to be a friend of the complainant informed him about receiving a telephonic call giving information that his daughter was not well and that he was asked to come up. He then told his son Himanshu to proceed, but immediately thereafter Nimawat came to his house and took him alongwith his son, wife to the house of his son-in-law Vishnu Dutta (appellant herein). On reaching the house of the appellant, the complainant saw the dead body of his daughter lying on the floor and his son-in-law (the accused) standing nearby the dead body. On being enquired about the death of Anuradha, the appellant expressed ignorance and told that he himself had to look into it as to what had happened. The complainant further stated that seeing the marks on the neck of his daughter, he believed that she had been murdered by the appellant to get rid of her, with whom, he

married on 24.6.1988.

3. On the basis of the report a case was registered and investigation had been carried of. The police on completion of investigation submitted challan against the appellant and in due course the case came up for trial before the learned Addl. Sessions Judge (Fast Track) No.1, Jaipur City, Jaipur, who framed charges U/s. 302 and 201 IPC against the appellant. The appellant denied the charges and claimed trial. The prosecution in support of its case examined as many as 15 witnesses and exhibited 47 documents. In the statement under Section 313 Cr.P.C., the appellant claimed innocence. It was stated by him that it had been a pre-plan of his wife's step-mother. He exhibited the statement of 6 witnesses. The learned trial Judge, on hearing the final submissions, convicted and sentenced the appellant as indicated here-in-above.

4. Learned counsel for the appellant vehemently assailed the findings of learned trial Judge and made following submissions:-

(i) Trial Judge failed to consider that since appelalnt had no motive to kill the deceased, the circumstantial evidence could not be acted upon.

(ii) Cause of death was not certain. As per the medical report the death could be caused either by administering poison or by Asphyxia or by burning.

(iii) Evidence of extra-judicial confession was unreliable.

5. Per contra, learned Public Prosecutor supported the impugned findings and urged that the appellant was rightly convicted and sentenced.

6. We have pondered over the submissions and with the assistance of learned counsel scanned the record thoroughly.

7. “Man may lie, but circumstances never”, it is a famous saying. There has been no eye witness of the incident and appellant has been convicted by the trial court on the sole basis of circumstantial evidence. It is now settled by series of decisions of the Hon'ble Supreme Court that for proving the guilt of the accused by circumstantial evidence, the prosecution must lead evidence to connect all links in the chain, so as to clearly point the guilt of the accused alone and nobody else.

8. In Balwinder Singh Vs. State of Punjab (AIR 1987 S.C.350) it was observed that circumstantial evidence should be looked into with utmost care and caution. Where the case against the accused depends on circumstantial evidence, any circumstance which destroys the presumption of innocence, can be taken into account to find out if the circumstances lead to no other inference but that of guilt. The Court has to take the totality of circumstances into consideration, and find if the case is established, that is,

the facts established are inconsistent with the innocence of the accused and incapable of explanation on any hypothesis other than that of guilt.

The chain of evidence must be so far complete:-

(i) as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused; and

(ii) as to show that within all human probability, the act must have been done by the accused.

In the appreciation of circumstantial evidence, the law may be taken to be that-

(a) the circumstances alleged must be established by satisfactory evidence, as in the case of other evidence;

(b) the circumstances proved must be of a conclusive nature and tendency so as to be totally inconsistent with his innocence and are not explainable on any other hypothesis except the guilt of the accused.

(c) although there should be no missing links in the case, yet it is not essential that every one of the links must appear on the surface of the evidence adduced; some of these links may have to be inferred from the proved facts;

(d) in drawing those inferences or presumptions, the Court must have regard to the common course of natural events, to human conduct and

their relation to the facts of the particular case;

(e) Where circumstances are susceptible of two equally possible inferences, the Courts should accept that inference which favours the accused rather than an inference which goes in favour of the prosecution.

9. As per Shahbuddin Vs. State of Rajasthan (1973 Cr. L.J. 723), the circumstantial evidence is sometimes more credible than direct evidence but the proved circumstances must be such which bring home the offence to the accused beyond reasonable doubt.

10. In Brijlal Vs. State of Rajasthan (1988 Raj. LW 18 at page 22 (Raj.), it has been observed that where case rests squarely on circumstantial evidence, the various sets of circumstantial evidence should be taken into consideration and their total effect should be such that they must lead un-erringly to the guilt of the accused, however, in the case of State of Rajasthan Vs. Sua (1984 Raj. Criminal Cases, 187 at page 191 (Raj.), it has been observed that this does not mean that before prosecution can succeed in a case resting upon circumstantial evidence alone, it must meet each and every hypothesis, suggested by accused, no matter how extravagant and fanciful it might be.

11. Their Lordships of Supreme Court observed in Inder Singh Vs. State

(Delhi Administration) {AIR 1978 SC 1091} that:-

"Credibility of testimony, oral circumstantial, depends considerably on a judicial evaluation of the totality, not isolated scrutiny. While it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that it should be perfect.

If a case is proved too perfectly, it is argued that it is artificial; if a case has some flaws, inevitable because human beings are prone to err, it is argued that it is too imperfect.

One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty men must be callously allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish and guilty man cannot get away with it because truth suffers some infirmity when projected through human processes."

12. As to the several values and cogency of direct and circumstantial evidence much has been both written and said, but both forms admit of every degree of probability. Abstractedly considered, however, the former is of superior cogency, in so far as it contains only one source of error, fallibility of testimony, while the later has, in addition, fallibility of inference. As we only know facts through the medium of witnesses, the truth of the fact depends upon the truth of witness. If men have been convicted erroneously

on circumstantial evidence, so have they on direct testimony, but is that a reason for refusing to act on such testimony?

13. Circumstantial evidence is direct evidence merely applied indirectly. When the direct evidence to prove a fact is found to be unreliable, the circumstantial evidence bearing upon the fact may be looked into. The circumstantial evidence should be like strong net (spider's web) leaving no exit for the accused to slip away. The various links in the chain, when taken in isolation, might not connect the accused with the commission of the crime but when taken together may unmistakably point out the guilt of the culprit.

14. Bearing these principles in mind we have to adjudge the cumulative effect of all the circumstances that were found established by the learned trial judge. They are as under:-

(i) Homicidal death

(ii) Motive

(iii) Last seen of appellant with the deceased

(iv) Extra judicial confession

(i) **Homicidal Death**

15. Death of Smt. Anuradha was undeniably homicidal in nature and it is not a natural death. As per post-mortem report (Ex.-P-45), following ante-mortem injuries were found on the dead body:-

"Ligature mark 32 Cm. in length ½ Cm. in

> breadth, slightly germed. Brownish in coloured hard. Margins of the ligature are abbraded ligature mark placed around below the thyroid protrubrance. Transversely it runs laterally on its left side. It found on right side 10 cm. below the right ear lobule. On left side it found 9 Cm. below the left ear lobule. It runs transversely upto the napne of the neck. Ligature completely encircle the neck. Pertinorly it has at the level of inferior nerchart levies. On dissection the under neath ligature mark is pale Brown and Hard. Tracheal found displaced. X-ray is taken. Whole of the laryngeal apparatus.
>
> Multiple elective burn mark of size varying from 2 X ½ C. to ½ X ½ cm. placed over dorsal aspect of right hand at places and also over palmer aspect of Index finger, Middle finger, ring finger. Part of the durum of right hand is blackish in colour. Skin is partly pealed off. Burn mark is slightly hard. On dissection under neath tissue found pale."

Vide Ex.-P47 dated 13.8.2001, the Medical Board opined that cause of death of the deceased had been Asphyxia due to Ante-mortem Strangulation by ligature & also found signs further suggestive of ingestion of Aluminium Phosphide. The electric burn marks shown in the Post Mortem report were post-mortem in nature.

16. Investigation Officer Prithvi Singh (PW-14) also proved Ex.P-7 (Panchayat Nama) that motbirs opined that deceased Smt. Anuradha probably died because of Asphyxia on account of strangulation in the throat.

In the opinion of Dr. Sheetal Jain (PW-15), who conducted autopsy on the dead body, the cause of death was Asphyxia. Thus the prosecution is

able to establish the homicidal death of deceased.

(ii) **Motive**

17. Motive plays an important role, when the motive of murder case solely rests on circumstantial evidence and thereby the merit of the case needs closer examination.

As observed by this Court in State of Rajasthan Vs. Ishwar Dan (1983 Cr. L.R. (Raj.) 361 at 367), motive is a subjective condition of mind and only the doer of the act knows the actual reason for his action. Presence of motive may lend support to the prosecution case, but its absence is not always fatal to it.

18. For the relevancy and importance of motive in the criminal trial following principles may be deduced-

i) It is not incumbent on the prosecution to prove the motive for the crime. It often happens that only the culprit himself knows what moved him to a certain course of action.

ii) But where the crime is alleged to have been committed for a particular motive, it is relevant to consider whether the pattern of the crime fils in with the alleged motive.

iii) In serious offences like murder, the court always searches for the motive and the motive always plays an important role.

iv) Motive is of great importance in cases based on circumstantial evidence, and where there is absence of such motive, the court should carefully examine the absence of motive as a circumstance in favour of the accused.

v) Where the motive is absent, it is always a circumstance in favour of the accused and against the prosecution.

vi) Where there is clear, cogent and positive evidence connecting the accused with the crime, the question of motive is of no importance.

vii) If motive is established, the adequacy of motive is not in all cases necessary.

viii) Motive, no matter how adequate, cannot sustain a criminal charge in the absence of clear and cogent evidence pointing to the guilt of the accused.

19. Coming to the facts of the instant case we notice that as per the statement of Radha Mohan Sharma (PW-2), Anurag Sharma (PW-4), Ashok Kumar Jain (PW-5), Smt. Kamla (PW-6), & Kartik (PW-1), it is clearly established that because of spoiled relations between the appellant and the deceased, there had been a strong motive behind murder. It appears that appellant wanted to get rid of the deceased in order to enter into second marriage.

(iii) **Evidence of last seen together** :

20. To establish the circumstances of last seen the prosecution examined Kartik Tiwari (PW-1), who is a 8 year's old son of the appellant and the deceased who categorically stated that on the fatal night the appellant administered full dose of some medicine to the deceased while she was going to sleep.

21. Learned counsel for the appellant contended that the testimony of child witness could not be relied upon since he was of tender age and under the influence of his maternal grand-father. We have considered this submission. Section 118 of Indian Evidence Act provides that the tender age of a child witness is to be taken with utmost care and caution and there should be close scrutiny of evidence of child before the same is accepted by the Court.

22. In Inder Singh Vs. State of Pepsu (AIR 1953 Pepsu 193), it has been observed that the competency of a child to give evidence is not regulated by the age but by the decree of understanding he appears to possess.

23. In Korangappa Vs. State of Kerala, {ILR (1967) 1 Ker 30}, it has been held that there is no legal impediment to the admissibility of evidence of child.

24. In Ghewar Ram Vs. State of Rajasthan {2001 Cr. LJ 4460 (para 16

(Raj.)}, it has been held that the evidence of a child witness is generally admissible in evidence but the quantum of weight to be attached to it, is a matter of consideration for the Court.

25. In practice, it is not unusual to receive the testimony of children of 8 or 9 years of age when they appear to possess sufficient understanding (Arulan Israel Vs. State, ILR (1954) TC 1200).

26. On a close scrutiny of evidence of Kartik Tiwari, we find it trustworthy. Even after searching cross examination, his evidence could not be shattered. In our opinion Kartik Tiwari, on the date of examination was a boy of matured understanding and his testimony was rightly relied on.

27. Ashok Jain (PW-5), who is a neighbour of the appellant specifically deposed that at 4.00 AM on the day of incident, the appellant came to him and informed him that his wife made attempt to commit suicide but he persuaded her not to do so and made her asleep. Dr. Rajendra Prasad (PW-9) visited the house of the appellant in the morning and found the wife of appellant dead. From the evidence of these witnesses we find that appellant and deceased were together in the house prior to the death of deceased.

28. Having critically scrutinized the evidence of Kartik Tiwari (PW-1), Ashok Kumar Jain (PW-5) & Dr. Rajendra Prasad Saini (PW-9), we find that they are credit worthy witnesses. The only criticism made against them

that they are highly interested, but this alone cannot be a ground to discard their testimony. However, it only pushes the Court on guard to scan the testimony of the witnesses with great circumspection. In the instant case, last seen theory comes into play and we find no reason to disbelieve the evidence of these witnesses. There is nothing on record to show that these witnesses have falsely implicated the appellant since they had no enmity with the appellant and the presence of these witnesses at the time indicated by them in their statement are quite natural and on examining them from the point of view of trustworthiness, we find their testimony is truthful and cogent.

(iv) **Extra Judicial Confession**:-

29. It is well settled that extra Judicial Confession is a weak type of evidence, but if it is of sterling worth, conviction can be based on it, provided such extra judicial confession was perfectly voluntary and it is true and trustworthy. Whether a confessional statement made is voluntary or not, is a pure question of fact.A free and voluntary confession is deserving of highest credit, because it is presumed to flow from the highest sense of guilt. It is not to be conceived that a man would be induced to make a free and voluntary confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true. Deliberate and voluntary

confessions of guilt, if clearly proved, are among the most effectual proofs in law. But, at the same time, no portion of evidence has invited so much careful scrutiny as the law of confessions. As Taylor says:- “The prisoner oppressed by the calamity of the situation may have been induced by motives of hope or fear to make an untrue confession and the same result may have arisen from a morbid ambition to obtain an infamous notoriety, from insane or criminal desire to be rid of life, from a reasonable wish to break off old connection and to commence a new career, from an almost pardonable anxiety to screen a relative or a comrade or even the delusion of an overwrought and fantastic imagination. This is not, however, intended to imply that there are no genuine incentives to confess which have been set out in several leading judgments.” Similarly in Jiwan v. Emperor, it was observed: “Much is said about the difficulty of understanding why a man should at one time make a confession and afterwards repent it. This is not a question of law but a question of human psychology and of experience. It is not really at all difficult to understand that a man who has committed a murder and who knows that all his neighbours and friends are well aware that he might be the guilty person should not have the hardihood to continue denying his guilt when he is confronted by persons who are making enquiries from him. It would probably be much more difficult in these

circumstances for a man to maintain his innocence than for him to confess his guilt. Afterwards, when he has time to consider his position and when he is removed from his everyday surroundings and possibly apprised by others (fellow prisoners, touts, etc.) that it is foolish of him to confess his guilt, it is natural that he should retract his confession is not by itself a sufficient reason for believing that the confession is false, when the confession has been made by the accused after he has time to consider the position and after he had been duly warned that it would be read in evidence against him.

30. Before an extra judicial confession can be accepted and acted upon, it must be seen whether it was natural conduct of the person and whether it was true and voluntary. As per evidence produced by prosecution in the instant case, BR Nimawat (PW-3), had stated that appellant made a confession when he was asked as to how Anuradha died. As per his statement:-

"विष्णु ने बताया कि यह तो मेरे से गलती हो गयी और पापा जी अब आप ही मुझे बचाना।"

Likewise as per the statement of Anurag Sharma (PW-4), when his father made a query from the appellant with regard to scratches on the neck of deceased Anuradha, the appellant could not reply properly and said that:-

"मुझ से गलती हो गई है आप ही मुझे बचा लो"

Smt. Kamla (PW-6) also stated affirmatively about the confession made by the appellant. She stated that:-

"मुलजिम विष्णुदत्त ने कहा कि मुझसे गलती हो गयी, मुझे माफ कर दो "

31. Having closely scanned the statements of witnesses we are of the opinion that they are of such strong and clinching nature that can be made the basis for arriving at a conclusive inference that it was only and only the appellant, who committed murder of his wife.

32. In the ultimate analysis, we find a combination of facts creating a network through which there is no escape for the appellant. The evidence collected by the prosecution is qualitatively so strong that on every reasonable hypothesis the conclusion is that appellant is guilty. We find that the chain of circumstantial evidence against the appellant is complete and incapable of any explanation or any other hypothesis than of the guilt of the appellant. Learned trial Judge in our considered view, has not committed any error in convicting and sentencing the appellant and we confirm the impugned findings.

33. For these reasons, we do not find any merit in the instant appeals and the same stand accordingly dismissed. The conviction and sentence awarded

to appellant under Section 302 and 201 IPC are maintained.

(Chatra Ram),J. (Shiv Kumar Sharma),J.

DK/-